IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JONATHAN KEITH REID,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:02CV00244
	)	
OFFICER GLEN FORD and OFFICER ALAN WALLER,	)	
	)	
	)	
Defendants.	)	

ORDER AND RECOMMENDATION OF MAGISTRATE JUDGE ELIASON

Facts

The facts of the case, as shown by the evidence and stated in the light most favorable to plaintiff, are as follows. Early on the morning of October 10, 2001, plaintiff and a woman named Tara Vaughn left a friend's house. At one point, they smoked crack cocaine and consumed some alcohol. (Pl.'s Dep. Tr. at 61) They later ate breakfast at McDonald's and then went to a Circuit City store in order to steal merchandise to pay for their drug use. Plaintiff was able to steal two CD burners, which he then took to a shopping center to sell.

Plaintiff did not find a buyer for the stolen merchandise. However, as he drove away from the shopping center, he did see a patrol car driven by defendant, and Salisbury Police Officer, Alan Waller. Plaintiff decided to avoid him because of the stolen merchandise still in the car and because plaintiff was driving without a license. Unfortunately for plaintiff, defendant Waller spotted him and began to pursue him because his car fit the

description of one that had been connected to some recent crimes, including an armed robbery.

Defendant Waller attempted to pull plaintiff over, but plaintiff sped up and began to evade him. Plaintiff stated in his deposition that the pursuit seemed to last longer than ten minutes and involved several patrol cars. It was a high speed chase. (Pl.'s Motion for Sum. Jud., Ex. B) The chase eventually went into a residential area where plaintiff admits that he made turns around several houses and did not always remain on the roadway while doing so. (Pl.'s Dep. Tr. at 80) Plaintiff finally turned onto Grubb Ferry Road. From there, he turned onto a dead-end dirt road that terminated in a circle with a water pump in the middle of the circle. According to all parties, as plaintiff turned to his right and entered the circle, defendants stopped their cars and pulled to the right side of the road near the beginning of the circle. They then exited their cars in order to wait on plaintiff to come back around the circle.

Plaintiff did continue around the circle and, as he came out of the circle, he was accelerating and his car was aimed roughly in defendants' direction.[1] He claimed in his deposition that he never intended to run over them. However, they state that they feared

[1]Plaintiff testified in his deposition and claims now that his car was never headed in defendants' direction. However, his own exhibit, which consists of a drawing of the scene, and his description of events show that it was a physical impossibility for his car to exit the circle without being aimed in defendants' direction at some point. (Pl.'s Resp., Ex. E) The amount of time that it was so aimed, the car's distance from defendants, and plaintiff's intent or apparent intent can be debated, but the fact that his car was pointed at defendants in some way, at some time, cannot.

that he was going to hit them and fired shots at his car. Plaintiff testified in his deposition that the shots were not fired until just after he had passed defendants and was driving back toward the main road. In any event, one of the shots pierced the driver's door of plaintiff's car and passed through his left forearm. He did not hit defendants, but continued back down the dead-end road and again turned onto Grubb Ferry Road. A few moments later, his car was hit and disabled by defendant Ford's car.

Plaintiff was not injured further in that collision and was captured and arrested at that time. He does allege that, after the chase ended, defendant Ford poked him in the head with a handgun stating, "I should blow your damn head off." Plaintiff claims Ford then pushed him to the ground, handcuffed him, grabbed his wounded arm, and tried to break it "as one would do to a stick." (Complaint at 5) Plaintiff was taken to the hospital and treated. He was reported to be uncooperative and intoxicated. (Pl.'s Motion for Sum. Jud., Ex. C)

Plaintiff was eventually charged with possession of a stolen vehicle, common law robbery, robbery with a dangerous weapon, eluding arrest, and two counts of assault with a deadly weapon on a government official. He was also charged with larcenies at other stores. The two assault with a deadly weapon charges were brought based on the allegation that he assaulted each of the defendants by driving his car at them and attempting to drive over them. He was

later indicted by a grand jury on the assault charges using this same basis.

On October 7, 2002, plaintiff pled guilty to several of the charges, including the two assault charges. He was then sentenced to 122-156 months of imprisonment and is currently incarcerated.

Plaintiff brings this action alleging that defendants violated his rights under the United States Constitution and 42 U.S.C. § 1983 because they used excessive force when they shot him.[2] He has moved to (1) amend his complaint to add compensatory damages, (2) compel discovery, (3) have defendants produce some of his medical records, (4) receive a compensatory award from defendants, and (5) for summary judgment. Defendants have also moved for summary judgment. Because the Court finds that defendants' motion for summary judgment should be granted and that the outcome of that motion resolves all pending motions, the Court will discuss defendants' motion first.

Discussion

Defendants claim that they are entitled to summary judgment based on the doctrine of qualified immunity. The Fourth Circuit has explained qualified immunity as follows:

> In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court established an "objectively reasonable" standard for qualified immunity. Government officials have qualified immunity for discretionary functions so long as "their conduct does

[2]Plaintiff does not pursue a claim based on defendant Ford allegedly poking him with a hand gun, saying that he should kill him, or twisting his injured arm. While he set out these facts in his complaint, he does not mention them in his response to defendants' motion for summary judgment. He does not show that he suffered any injury from these events. Therefore this is not a claim.

> not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818, 102 S.Ct. at 2738. In determining the availability of qualified immunity, the point of reference is the time at which the action or inaction occurred. Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. We have held that officers are entitled to qualified immunity when they rely on standard operating procedures, if that reliance is reasonable. Vizbaras v. Prieber, 761 F.2d 1013, 1015 (4th Cir.1985), cert. denied, 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986). A police officer is entitled to prevail on an assertion of qualified immunity if a reasonable officer possessing the same information would have believed his conduct was lawful. Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir.1991). See Pritchett v. Alford, 973 F.2d 307 (4th Cir.1992); Torchinsky v. Siwinski, 942 F.2d 257, 260 (4th Cir.1991); Korb v. Lehman, 919 F.2d 243 (4th Cir.1990), cert. denied, 502 U.S. 808, 112 S.Ct. 51, 116 L.Ed.2d 28 (1991); Goodwin v. Metts, 885 F.2d 157 (4th Cir.1989), cert. denied, 494 U.S. 1081, 110 S.Ct. 1812, 108 L.Ed.2d 942 (1990); Gooden v. Howard Co., Md., 917 F.2d 1355 (1990)[sic].

Shaw v. Stroud, 13 F.3d 791, 801 (4th Cir), cert. denied, 513 U.S. 814, 115 S.Ct. 68, 130 L.Ed.2d 24 (1994).

Here, plaintiff was shot while officers were attempting to arrest him. The United States Supreme Court has held that claims of excessive force during an arrest or other “seizure” of a person are to be analyzed under the Fourth Amendment’s objective reasonableness standard. Graham v. Conner, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). The reasonableness of the force used is to be judged from the view of a reasonable officer on the scene, and not “with the 20/20 vision of hindsight.” Id. at 396, 109 S.Ct. 1872. The evil or good intentions of the officers involved have no bearing on the objective reasonableness of the level of force allowed to be used in a particular situation. Id. However, the existence or lack of good faith on the part of an

officer may play a role during some parts of the evaluation process of a qualified immunity defense. See Id. at 399, 109 S.Ct. at 1873 n.12.

An initial problem for plaintiff is the fact that he pled guilty to assaulting defendants with a deadly weapon, i.e. his car. He does not claim that an officer being assaulted with a deadly weapon does not have the right to defend himself with force, including deadly force. Instead, plaintiff first tries to deny the import of his guilty pleas by stating that he was forced into them by threats of long jail sentences and by a conspiracy to conceal evidence that would have helped him fight the charges. However, this does not change the fact that he did plead guilty to using his car as a deadly weapon to assault defendants. Moreover, to the extent that he might be attempting to challenge this fact as a part of his lawsuit, it represents a challenge to his convictions and he may not use an action under a 42 U.S.C. § 1983 or other civil lawsuit to do so. See Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). (Plaintiff must first have his conviction overturned or annulled prior to seeking civil damages.) Heck applies even when a plaintiff is not directly seeking damages based on his conviction, but the validity of the conviction has other relevance in the civil action. Harvey v. Horan, 278 F.3d 370 (4th Cir.), reh'g and reh'g en banc denied, 285 F.3d 298 (4th Cir. 2002)(trying to use 42 U.S.C. § 1983 as a discovery device to obtain DNA test). For this reason, the Court accepts as

established the fact that plaintiff assaulted defendants with his car by attempting to drive over them.

The fact that plaintiff assaulted defendants with his car does not end the case as quickly and easily as defendants might hope. This is because plaintiff claims that defendants did not shoot him until he had already driven past the position where they were standing near their parked cars.[3] In his view, the shot occurred at a time when he was again fleeing, and any assault on the officers had ceased.

Assuming that defendants shot plaintiff while he drove away from them and after any immediate danger to their persons had passed, plaintiff still cannot prevail. This is because police officers can use deadly force to stop a fleeing felon where they have "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . . ." Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985)(emphasis added). In determining whether excessive force was used while apprehending a suspect, a four-part test may be employed. Each situation must be judged by (1) the severity of the crime the suspect is believed to have committed, (2) the threat

[3]Plaintiff bases his conclusion on the entrance and exit wound in his forearm and the bullet hole in the car. (Pl.'s Resp., Exs. C1 and C2) However, a view of the photographs does not clearly reveal that the bullet entered the vehicle from behind as opposed to from the side or slightly from the front. The vehicle was accelerating forward at the time into the path of the bullet. Moreover, in this case, there is an additional problem. Given the rapidly changing situation caused by plaintiff's continuing acceleration toward the officers, this is not a case where the officers clearly fired after the danger ceased. It appears that the aiming and firing sequence was initiated while plaintiff was approaching the officers, although it may have concluded after the car was alongside or slightly past the officers.

he poses to the safety of officers or others, (3) whether he is actively resisting or evading arrest, and (4) whether, if feasible, a warning was issued. Id. at 12, 105 S.Ct. at 1701; Scott v. Clay County, Tenn., 205 F.3d 867, 876-877 (6th Cir.), cert. denied, 531 U.S. 874, 121 S.Ct. 179, 148 L.Ed.2d 123 (2000).

Here, plaintiff was believed to have committed an armed robbery at the time defendant Waller first tried to stop him. Then, defendants witnessed him recklessly and dangerously elude arrest in his car, drive off the roadway while making turns around houses, and assault them by trying to drive over them. This list of serious, dangerous, and even violent felonies, weighs strongly in defendants' favor on all of the first three factors. Plaintiff was suspected of a serious crime and committed two other dangerous crimes while defendants attempted to capture him. He clearly posed a threat to defendants' safety, other drivers' safety, and the safety of the residents of the neighborhood that he was driving wildly through. Finally, he was in the process of actively evading arrest, and accelerating at the officers in his vehicle. The defendants claim that they gave plaintiff a verbal warning to stop, but he testified in his deposition that he could not hear anything over the noise of the car. (Pl.'s Dep. at 90) Therefore, no further verbal warning was feasible. Also, plaintiff admitted in his deposition that when he came around the water pump in the direction of the officers, he saw them standing with their guns drawn. (Id. at 89) This should have served as a clear warning that defendants were prepared to use deadly force. Still,

plaintiff drove his vehicle in their direction and then accelerated past them in an attempt to escape.

Based on these facts, defendants are easily entitled to qualified immunity for their decision to shoot plaintiff. Other courts in similar situations have granted qualified immunity to officers and this court should as well. See Pace v. Capobianco, 283 F.3d 1275 (11th Cir. 2002)(deadly force allowed where pepper-sprayed subject led police on a long high-speed chase, drove wildly, nearly hit other motorists, accelerated toward a patrol car); Scott supra (deadly force allowed where subject led police on 20 minute high-speed chase, crashed, restarted his car, drove at an officer, and tried to return to the road); Smith v. Freland, 954 F.2d 343 (6th Cir.), cert. denied, 504 U.S. 915, 112 S.Ct. 1954, 118 L.Ed.2d 557 (1992)(deadly force allowed where suspect led police onto high-speed chase into a residential area, came to a stop at a dead end, turned around, smashed an unoccupied police car that blocked his path, and tried to drive off).

In both Scott, supra, at 877, and Smith, supra, at 347, the courts emphasized the importance of the second and third Garner factors which look to whether the suspect poses a danger not just to the police, but others, and whether the suspect is actively trying to escape. There, the suspects had driven very recklessly previously and were resuming the dangerous behavior. The courts emphasized that the police could consider the danger to other drivers and pedestrians because the suspect was using his vehicle as a dangerous weapon and, in so doing, was also evading arrest.

In such circumstances, deadly force could be employed. And, in Pace, supra, at 1283, the court reasoned that the shots fired at a vehicle seconds after a car momentarily stopped after a long and dangerous chase did not amount to excessive force, and that the law has not clearly established such would be excessive force.

The situations in the above cases were similar to that facing the officers in this case. Plaintiff was driving recklessly, unable to keep his vehicle on the road in a residential neighborhood. He posed a danger not only to the police officers, but other motorists and pedestrians. His vehicle had become a dangerous weapon and he was attempting to escape. Plaintiff has not cited any cases that prohibit officers from employing deadly force to protect the public from people using dangerous weapons and to arrest persons suspected of committing serious felonies, and who are committing serious felonies at the time.

In some cases involving shots fired at fleeing suspects in cars, the courts have not granted qualified immunity. However, those cases involved less egregious facts than the cases cited above and the case at bar. See, e.g., Haugen v. Brosseau, 339 F.3d 857 (9th Cir. 2003)(no violent or serious crime beforehand, chase just beginning, no warning, and distinguishing cases where the actual reckless driving justified use of deadly force); Vaughn v. Cox, 264 F.3d 1027 (11th Cir. 2001), vacated by, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002), reinstated and supplemented on remand, 316 F.3d 1210 (11th Cir. 2003)(shots fired after high-speed pursuit, but no serious crime committed beforehand, no immediate

danger to officers or others on road, and no warning attempted before shooting). The facts in the present case are far more similar to those in Pace, Scott, and Smith, than to those in Haugen or Vaughn. Defendants are entitled to immunity.

Even if defendants' shooting of plaintiff was a reaction to an imminent assault against their persons, as opposed to a reasoned and deliberate decision to shoot him to protect other officers, motorists, and residents of the neighborhood, they did not apply an unreasonable amount of force to apprehend him and did not violate his Fourth Amendment rights. As the United States Supreme Court has stated, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-397, 109 S.Ct. at 1872. The situation here is the epitome of a "tense, uncertain, and rapidly evolving" circumstance.

In a recent decision, the Fourth Circuit has held that the reasonableness of the force must be judged based "on the information possessed by the officer at the moment the force is employed, Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005). (Waterman will be discussed more fully in the next section.) This does not mean, however, that actions initiated while the danger is apparent, but concluded after it has passed, should be dissected into milliseconds in order to have an officer's conduct be judged on that basis. The plaintiff must show there are disputed facts as

to whether the danger had clearly passed sufficient for a reasonable officer not only to be able to recognize that fact, but to be able to stop any initiated actions. Waterman, itself, is not controlling on this particular issue because there, the vehicle had passed by all officers and temporarily stopped behind another vehicle when the officers again opened fire. Likewise, in a Third Circuit case cited in Waterman, the court found that a shot into the side of a vehicle which hit the back of the suspect's arm did not justify summary judgment for the officer where there was a dispute as to whether the officer was ever in danger at all. Here, the shot was not in the back of the vehicle, but at its side and in plaintiff's forearm. The car was definitely pointed at the officers and accelerating as it left the circle. Plaintiff does not forecast any evidence showing that the danger to the officers had clearly passed at the time they initiated firing.[4] Therefore, it cannot be said that the force they used was excessive under the circumstances. On this basis also, defendants are entitled to qualified immunity.

Defendants' motion should also be granted because, even if the Court were to somehow find that they employed excessive force when

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[4]The danger must have clearly passed because, as the Supreme Court stated in Hunter v. Bryant, 502 U.S. 224, 229, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991):

> The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." Malley, supra, 475 U.S., at 343, 341, 106 S.Ct., at 1097, 1096. This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued. Davis, supra, 468 U.S., at 196, 104 S.Ct., at 3020.

they fired on plaintiff, no officer in their position would have known that shooting plaintiff would violate clearly established law.[5] This conclusion is compelled by Waterman, 393 F.3d 471. In that case, officers shot a motorist who had refused to stop and who previously had accelerated somewhat in their general direction, but without the uncontrolled reckless driving as in the instant case. Some shots were fired before he had passed the officers, but some were fired just after he had passed them. Id. at 475. There was no argument that he posed a danger to them or anyone else at the point that he had passed them. The Fourth Circuit found that the officers did not use excessive force in firing the shots as the vehicle approached, but determined that a fact finder could reach the opposite conclusion regarding the shots fired after it had passed. Id. at 482.[6]

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[5]Plaintiff relies heavily on a directive that prevents police officers from firing at a moving vehicle unless deadly force is used against an officer by means other than the vehicle itself. He may be claiming this to be the "established law." This argument fails for several reasons. First, this case is about whether defendants violated the United States Constitution, not a police directive. Police directives are not dispositive of any reasonableness analysis. Altman v. City of High Point, N.C., 330 F.3d 194, 212 (4th Cir. 2003); Smith v. Freland, 954 F.2d 343, 347 (6th Cir.), cert. denied, 504 U.S. 915, 112 S.Ct. 1954, 118 L.Ed.2d 557 (1992). Second, the directive referred to by plaintiff is for police officers in Raleigh, North Carolina, a city not even remotely connected to this case.

[6]It is not clear how certain it was that the car had passed the officers and the court does not deal with whether the shots were initiated prior to the car passing the officers. In the instant case, even plaintiff admits the bullet hit the side of his vehicle, not the back. Also, plaintiff was wanted for serious felonies and was committing them at the time. Therefore, the facts of the instant case are far more egregious than those of Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005). Finally, in the instant case, plaintiff posed a danger to others. In Waterman, the court limited its focus to danger to the officers.

Despite finding that a jury could determine that the officers in Waterman used excessive force, the court in that case granted qualified immunity to the officers because it stated that the law in the Fourth Circuit that was in effect at the time the officers fired the shots was susceptible to being read to allow officers to shoot into a vehicle in the moments just after an assault by vehicle had occurred. Id. at 482-483. It reached this conclusion based largely on the case of Pittman v. Nelms, 87 F.3d 116 (4th Cir. 1996). In Pittman, two officers stopped a suspected drug dealer. One of the officers approached the stopped car, but, as he leaned into the window to talk to the driver, the car drove off. The officer's arm was caught in the car's window and he was dragged for about 25 feet before freeing himself. He and his partner then fired at the fleeing car, with one of his partner's bullets striking Pittman, who was a passenger in the car. Id. at 118. Based on Graham's language concerning "tense, uncertain, and, rapidly evolving situations" the Fourth Circuit granted qualified immunity even though it was alleged that both officers were clear of the fleeing car for a few seconds before firing. Id. at 120.

Waterman, Pittman, and the case at bar are factually similar, except that considering the four Garner factors, the situation in this case presents a much stronger one for employing deadly force. Because Pittman was valid case law at the time the facts underlying Waterman took place, the Fourth Circuit concluded that reasonable officers firing at a suspect in a car even a few moments after any danger to them had passed would not have known that their use of

force was excessive. The same is true here. Pittman was decided in 1996, the facts of this case occurred in 2001, and Waterman, to the extent that it may have modified Pittman, was not decided until January of 2005. For this additional reason, defendants' motion for summary judgment should be granted on the basis of qualified immunity.[7]

As set out previously, plaintiff has made several motions of his own. The Court finds that they should or will be denied as follows: (1) plaintiff's motion to amend his complaint to add compensatory damages should be denied for being moot given the outcome of defendants' motion for summary judgment; (2) plaintiff's motion to compel discovery will be denied because the information sought would not affect his case given that the Court accepted the facts essentially as plaintiff alleged them, except where contradicted by his guilty plea; (3) plaintiff's motion for production of his medical records will be denied for being moot because nothing in the records could affect the analysis of defendants' decision to shoot him, and, in any event, plaintiff produced his medical records; (4) plaintiff's motion to receive a compensatory sum should be denied for being moot because of the outcome of defendants' motion for summary judgment; and (5)

[7]It is important to note that the Court is not finding the force used by defendants was excessive. In Waterman and Pittman, there was no evidence of significant danger to others besides the officers and the suspects in those cases had not committed other serious crimes. These factors distinguish the present facts from those cases and make the case at bar more similar to the previously discussed cases that would allow suspects to be shot. Waterman is relevant only to underscore the point that, even if the Court were to make a finding of excessive force or if its conclusion that excessive force was not used was later found to be incorrect, defendants would still be entitled to qualified immunity.

plaintiff's motion for summary judgment should be denied for the same reasons that defendants' motion should be granted.

IT IS THEREFORE ORDERED that plaintiff's motion to compel discovery (docket no. 37) and motion to compel production of his medical records (docket no. 42) be, and the same hereby are, denied.

IT IS RECOMMENDED that plaintiff's motion to amend his complaint (docket no. 36), motion to receive a compensatory sum (docket no. 44), and motion for summary judgment (docket no. 45) be denied.

IT IS FURTHER RECOMMENDED that defendants' motion for summary judgment (docket no. 47) be granted and that Judgment be entered dismissing this case in its entirety.

Russell A. Eliason
United States Magistrate Judge

March 11, 2005